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No. 85-637

In The
Supreme Court of the United States
October Term, 1985

DONALD P. HODEL, Secretary of the Interior,
Appellant,
v.
MARY IRVING; et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of appellees, Mary Irving, *et al.* Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for Pacific Legal Foundation is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only when it concludes that Pacific Legal Foundation's position has broad support within the general community. Pacific Legal Foundation's Board of Trustees has authorized the filing of this brief.

At issue in this case is property that was held by Irving's decedents (decedents) which was subject to Section 207 of the Indian Land Consolidation Act of 1983, 25 U.S.C. § 2206. Section 207 classified certain property interests held by decedents as being *de minimis* and therefore not capable of being devised to potential heirs. Instead this property escheats to the tribe. The stated purpose of Section 207 is to prevent the further fractionation of property interests held by Sioux Indians. However, it is the position of amicus curiae, Pacific Legal Foundation, that Section 207 attempts to remedy a recognized problem through a constitutionally invalid method. If individual rights in property are to be preserved, the constitutional guarantee that just compensation must be paid when private property is taken by government must be applied whenever a taking of a property interest occurs. Allowing Congress to set an arbitrary level of value which must be met before the taking of a particular property interest requires compensation would vitiate the constitutional protection of the Fifth Amendment.

Pacific Legal Foundation's public policy perspective in support of private property rights will help provide this Court with a more complete briefing of the interests at stake in this litigation.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 758 F.2d 1260 (8th Cir. 1985).

SUMMARY OF ARGUMENT

The application of Section 207, as originally enacted, deprives the estates of certain Sioux Indians of all interests in certain property held by the decedents. This mandated forfeiture of property was enacted against an identifiable class of persons without notice or reasonable opportunity to protect the property interests at stake and with no provision for the payment of compensation.

The appellant, Donald P. Hodel, argues that under the three part analysis formulated by this Court in *Penn Central Transportation Company v. New York City,* 438 U.S. 104, 124 (1978), no taking of a private property interest has occurred. The analysis set forth in *Penn Central,* however, applies to those situations where the government is *regulating* the use of property. This case involves no regulation of the use of property. The property interest is simply forfeited. Thus, the *Penn Central*

analysis is inapplicable. To determine if a taking of property has occurred in this case it is only necessary to analyze the nature of the interest at issue to determine if it is deserving of constitutional protection. Whether constitutional protection is required is dependent on the nature of the interest not its monetary value. The interest need not be a fundamental common law property interest. It is sufficient that an expectancy of a protected interest has been created by statute or accepted by practice. Although individuals may lose such interests to government action, the deprivation may occur only in a constitutionally acceptable manner.

The application of Section 207 to decedents' property effectively deprives the decedents' estates of the entire property interests. Such a drastic revision to the established concept of property must provide notice and a reasonable opportunity to avoid the forfeiture if constitutional mandates are to be met. Section 207 incorporates no provision to protect the individual rights in property affected by its application. It therefore fails to meet the minimum concepts of fairness embodied in the Due Process and Taking Clauses of the Fifth Amendment.

I

THE APPLICATION OF SECTION 207 EFFECTS A TAKING OF PRIVATE PROPERTY

A. The Three Part Analysis Formulated by This Court in Penn Central Transportation Company v. New York City Is Not Applicable to the Circumstances of This Case

Hodel argues that this case is controlled by the analysis in *Penn Central,* 438 U.S. at 124, where this Court stated that whether a regulation effects a taking of property depends on "[t]he economic impact of the regulation on the claimant . . . the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action." This three part analysis, however, was developed to aid in determining whether a regulation of the use of property constituted a taking. In *Penn Central* the City of New York prevented the Penn Central Transportation Company, which owned Grand Central Terminal, from constructing a multistory office building on top of the terminal. The city did not remove the terminal from Penn Central's ownership, it merely regulated the manner and use of the terminal property.

When the owner of property retains title but a claim is made that the regulation of use goes too far and effects a taking of the property, the *Penn Central* test enables the reviewing court to evaluate the effect on the property under the circumstances of the particular case. Hodel's attempt to characterize Section 207 as such a regulation of property use, however, is disingenuous. The intent of

Congress and the actual effect of Section 207 is to transfer ownership from one party to another. It makes little sense to speak of the character of the governmental action, the economic impact, and the interference with investment backed expectations when there has been a total deprivation of property. For the same reasons Hodel's reliance on *Andrus v. Allard*, 444 U.S. 51 (1979), is misplaced. In *Allard* this Court emphasized that "it is *crucial* that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." *Id.* at 66 (emphasis added). The estates in this case retain no rights at all. Section 207 transfers all interest in the property to the tribe. The only analysis needed in the present case is whether Section 207 destroyed a protected property interest. If it did, then the protections of the Fifth Amendment apply.

B. Sioux Indian Property Owners Who Took Title Prior to the Enactment of Section 207 Had a Reasonable and Legitimate Expectation of a Power to Dispose of the Property at Time of Death Which Is a Protected Interest Under the Fifth Amendment

The brief for appellee recounts the historical basis for the claim by the affected Sioux Indians to a protected interest in passing their property to their family on death. In the context of the Due Process Clause it has long been recognized that an individual will be found to have a property interest if he or she has "a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Such a "claim of entitlement" can be created expressly by statute, *id.* at 577, or implied by government action. *Perry v. Sindermann*, 408 U.S. 593, 602 (1972).

Similar interests have been recognized as protected by the Just Compensation Clause. *Ruckelshaus v. Monsanto Co.*, 467 U.S. —, 104 S. Ct. 2862 (1984), one of the more recent decisions of this Court applying the Just Compensation Clause, is an example of such a case.

In *Ruckelshaus* the Court was faced with the question of whether the data disclosure provisions of the Federal Insecticide, Fungicide, and Rodenticide Act violated the Just Compensation Clause. A manufacturer alleged that the disclosure of data by the Environmental Protection Agency (EPA) constituted a taking of property without the payment of just compensation in violation of the Fifth Amendment. The Court determined that the manufacturer did have a property interest protected by the Constitution in the data supplied to EPA. *Id.* at 2874. The Court based this conclusion on a consideration of whether under the circumstances of that case, the manufacturer had a legitimate expectation that its data would be kept confidential when submitted to EPA. *Id.* at 2876-78. The Court concluded that for the period from 1972 to 1978, the manufacturer did have such an expectation which resulted from an explicit guarantee by the federal government that data provided by the manufacturer would be kept confidential. Although in *Ruckelshaus* as in this case the statute was amended to remove the provisions which created the protected interest, this Court ruled nonetheless that disclosure of data which destroyed the interest in confidentiality created prior to the amendment would constitute a taking. *Id.* at 2879. Although the Court recognized that some "restrictions are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community,' " *id.* at 2875, quoting *Andrus v. Allard*,

444 U.S. at 67, those restrictions are limited when a protected property interest arises from "the expectations of the submitter." *Ruckelshaus,* 104 S. Ct. at 2879 n.17.

The holding in *Ruckelshaus v. Monsanto Co.* clearly establishes that property interests protected by statute are not subject to destruction by statutory amendment without regard for the reasonable and legitimate expectations created by the statute in affected property owners. This Court recognized in *Choate v. Trapp,* 224 U.S. 665 (1912), that a reasonable and legitimate expectation held by Indian property owners that their allotments would maintain tax-exempt status for a stated period of time was a protected interest under the Constitution. Similarly, in this case, given the long-standing legal rights established by the Act of March 2, 1889, ch. 405, 255 Stat. 891, and the Act of June 25, 1910, ch. 431, 36 Stat. 855, the Sioux Indian landowners who held title before the enactment of Section 207 had a reasonable and legitimate expectation that they would be capable of disposing of their property to their heirs at the time of their death. This reasonable and legitimate expectation is a property interest subject to constitutional protection.

C. Constitutional Protection of Property Is Not Dependent Upon the Size of the Interest at Issue

Hodel states that "[o]f the 41 interests in allotments in this case that escheated to the tribe pursuant to Section 207, 17 earned less than $1.00 in the preceding year, 29 earned less than $5.00, and all but two earned less than $10.00" (Brief for the Appellant at 33), and that "Congress reasonably could determine that such an interest is sufficiently de minimis in its relative economic value and

reflects a sufficiently insubstantial stake in the allotted parcel as a whole to warrant its devolution to the tribe in lieu of still further fractionation." Brief for the Appellant at 33.

Thus, Hodel asserts that the property interests at stake in this case are not deserving of constitutional protection because they are too small. However, constitutionally mandated protection of property is not dependent upon the size of the interest at stake, but upon the nature of the interest.

"[W]e must look not to the 'weight' but to the *nature* of the interest at stake. [Citation omitted.] We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. at 571 (emphasis in original). "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The focus on the nature of the interest is evident in *Fuentes v. Shevin*, 407 U.S. 67 (1972), where this Court held that constitutional protection is required to be accorded household goods taken under a prejudgment writ of attachment even though the deprivation is only temporary, full legal title is held by other individuals and the household goods cannot be considered as necessities. *Id.* at 85-90.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds, Daniels v. Williams*, — U.S. —, 88 L. Ed. 2d 662 (1986), a Nebraska prison inmate sued prison officials for the loss of certain hobby materials which were

lost after delivery to the prison. The hobby materials were valued at $23.50. *Id.* at 529. This Court recognized that the hobby materials, even though valued at only $23.50, were subject to constitutional protection. "Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation." *Id.* at 536. If a hobby kit valued at $23.50 is deserving of constitutional protection then clearly the interests in property forfeited under Section 207 are deserving of protection. Properties earning $99 per year could have capitalized values approaching $1,000.

This Court has reached a similar conclusion in an analogous situation. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court analyzed whether a state law which allowed the attachment of cable television cables and wiring boxes to buildings without the consent of the owners constituted a taking of property without just compensation. The space required for the attachment of the wiring boxes amounted to one and one-half cubic feet. *Id.* at 438 n.16. In holding that the attachment of cables and wiring boxes constituted a physical invasion this Court stated: "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436. The extent of the physical invasion was significant only in determining the amount of compensation owed.

In *United States v. Causby*, 328 U.S. 256, 261 (1946), and *Boston Chamber of Commerce v. City of Boston*,

217 U.S. 189, 195 (1910), this Court held that the value of property should be determined by the owner's loss and not by what the taker has gained. A determination by Congress that the property interests are *de minimis* cannot override the significance of the property interest to the owners. Whether the owner of a property interest subject to Section 207 will consider income of up to $99 per year to be significant will depend on individual circumstances. Although Hodel states, "the owner of an undivided interest in an allotted parcel *almost* invariably does not occupy or use the land," Brief for the Appellant at 32 (emphasis added), this does not mean that such occupation is not possible. It is apparent that some of the property interests at issue in this case are sufficiently large to accommodate occupation if other circumstances were to allow it. *See* Joint Appendix (JA) at 12-13. Accepting Hodel's claim that constitutional protection of property can be withdrawn whenever Congress determines the interest to be negligible would be a far-reaching step in the process of eliminating the right to private property.

The Just Compensation Clause of the Fifth Amendment does not protect the property itself but the owner's personal interest in it. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). It is clear, therefore, that although some of the property interests may be considered small, the size of the interest is not determinative of whether it is constitutionally protected. The nature of the interest and the potential value of the property to the Sioux Indian owners in this case indicate it is a property right protected by the Constitution.

II

SECTION 207 FAILS TO PROVIDE THE CONSTITUTIONALLY REQUIRED REASONABLE OPPORTUNITY FOR THE PROPERTY OWNERS TO TAKE STEPS TO AVOID ESCHEAT OF THEIR PROPERTY

In *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), this Court recognized that statutory modifications of established property interests are subject to constitutional limitations. The Indiana statute at issue in *Texaco, Inc. v. Short* provided that a severed mineral interest which had not been developed for a period of 20 years would revert to the current surface owner. The statute, however, provided that lapse could be avoided

> "[i]f the owner engages in actual production, or collects rents or royalties from another person who does or proposes to do so . . . [i]f the owner pays taxes, no matter how small . . . [or] [i]f the owner files a written statement of claim in the county recorder's office." *Id.* at 529.

In addition to these protections a two-year grace period was included which provided time for affected individuals to become familiar with the statute. *Id.* at 518. This Court expressly concluded that a created property interest "is entitled to constitutional protection." However, that constitutional protection does not deprive the state of "the power to condition the permanent retention of that property right on the performance of *reasonable* conditions that indicate a present intention to retain the interest." *Id.* at 526 (emphasis added). This Court's analysis emphasized the importance of the inclusion of a two-year grace period to allow affected property owners the opportunity to protect their interests:

> "In short, both the Indiana Legislature and the Indiana Supreme Court have concluded that a 2-year period was sufficient to allow property owners in the State to familiarize themselves with the terms of the statute and to take any action deemed appropriate to protect existing interests. On the basis of the records in these two proceedings, we cannot conclude that the statute was so unprecedented and so unlikely to come to the attention of citizens reasonably attentive to the enactment of laws affecting their rights that this 2-year period was constitutionally inadequate." *Id.* at 532-33.

Although Hodel argues that affected property owners had the power to avoid forfeiture of the property under Section 207, Brief for the Appellant at 9-10, no grace period was provided to grant property owners the time required to complete the intervivos transfers necessary to avoid escheat. Under the Indiana statute the property owner had two years to file "a written statement of claim." *Id.* at 529. Under Section 207 Sioux Indians, many of whom can be expected to have little knowledge of legal transactions related to real property, are given no specified time to learn of the effect of the statute and to consummate intervivos transfers or "to apply to the Secretary for a partition of the tract." Brief for the Appellant at 10. Moreover there is a serious question of the reasonableness of the options available. Contrary to the simple tasks which preserved the property interest at stake in *Texaco, Inc. v. Short*, the time involved to complete the actions necessary to avoid forfeiture under Section 207 may be substantial, particularly in light of the nature of the property interests involved.

The fate suffered by Geraldine Poor Bear Cross is instructive. After the effective date of Section 207 she attempted to provide for her five minor children to receive the property. Obviously unaware of Section 207 she attempted to devise the property rather than to make gifts of her interests. Brief for the Appellant at 34 n.20. As a result her minor children lost at least 26 separate interests in property. Brief for the Appellant at 13. The purpose of the Fifth Amendment is to ensure that government cannot force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Although Section 207 may benefit the tribe and improve the administration of certain lands, these reasons do not justify an unconstitutional taking: "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

There is no justification for concentrating on the minor children of Geraldine Poor Bear Cross the costs of improving the administration of trust lands. Alternative constitutionally valid methods exist by which the same governmental objectives may be accomplished. *See* Amicus Brief of the Yakima Indian Nation at 2 ("the Yakima Indian nation has expended over fifty-five million dollars to purchase trust lands from allottees under a land consolidation enterprise"). A grace period and other procedural safeguards could be included in Section 207 to provide reasonable assurance that protected interests are lost only when owners have knowledge of the pending forfeiture and have failed to take reasonable steps to avoid

the loss. The summary termination of the protected property interests of these Sioux Indians cannot be justified under these circumstances.

CONCLUSION

The application of Section 207 under the circumstances demonstrated by this case deprives Sioux Indian property owners of protected property interests in violation of the Fifth Amendment.

For the reasons set forth herein, amicus curiae, Pacific Legal Foundation, respectfully urges this Court to affirm the decision of the United States Court of Appeals for the Eighth Circuit.

DATED: May, 1986.

Respectfully submitted,

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